Supreme Court, U.S.
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Docket No. _____

The Supreme Court of the United States

John Barth,
Petitioner and Representative of Plaintiff Class
v.
Town of Sanford and its Inhabitants,
Selectmen of Sanford, William Roberts and Richard Wilkins
in their individual capacities,
Respondents and Defendants

On Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. May res judicata be invoked where defendant did not answer prior complaint; or prior action did not determine the causes of action; or prior judgment did not recognize a claim?
2. Does dismissal without trial or showing of an irremediable defect precluding due process, caused solely by plaintiffs, deny due process in civil rights action?
3. Does dismissal of a complex complaint on basis of length deny due process, where plaintiffs could not abbreviate to 30 pages for all pleadings? Must length be due to plaintiff fault, or to quantity and complexity of offenses, evidence, and law?
4. Is state doctrine of discretionary procedural dismissal unconstitutionally broad in civil rights complaints? Does refusal of involved judge to recuse deny due process?
5. Is prior judgment without due process admissible as final judgment on the merits for purposes of claim preclusion?
6. Can a defendant assert that claims are identical to prior claims it argued could not be comprehended or answered? Does such perjury collaterally estop defense of res judicata?
7. May res judicata preclude a new claim distinct in kind, or of continuing tort? Is judicial doctrine precluding redress of present abridgment of constitutional rights unconstitutional?
8. Is municipal employee or officer identical with municipality where sued individually for civil rights violation?
9. Is town of Sanford's governmental capacity identical with its non-governmental capacity in civil rights action, or with its Inhabitants' non-governmental capacity? Does contradictory perjury of such identity estop defense of res judicata? Is the tort claims act of Maine unconstitutionally overbroad?
10. Does striking claim of perjury prove prejudice of judge?
11. Does class action determination require counsel? Does denial of counsel and class determination deny due process?
12. Does the use of noisy off-road hobby vehicles near residences constitute private nuisance? Does municipal permission thereof constitute taking of private property?

PARTIES

P1. Plaintiff class consists of the residents and landowners of the village of Springvale in the town of Sanford who reside within seven hundred feet of the former railbed there ("Primary Impact Area" Exhibit E-3), and are injured in the use or enjoyment of their property by acts of defendant in maintaining, promoting, extending and refusing to abate a noise nuisance there.

P2. Plaintiff John Barth is president of Springvale School ("School"), a Maine corporation which since 1992 has been renovating the former upper campus of Nasson College in Springvale, to operate there a college preparatory school. The campus abuts the long-abandoned railbed. Springvale School will provide scholarships; jobs for the community; and sponsorship of thousands of orphans in the developing nations, using for such purposes the proceeds saved by renovation of the former college buildings. Barth is also an owner of land, and a resident, within the Impact Area.

P3. Defendant Town of Sanford (population c. 23,000) including the village of Springvale is a former mill town located in southern York county, state of Maine, sued in its non-governmental capacity as a corporation holding property in common for the benefit of its members.

P4. Defendants the Inhabitants of the Town of Sanford are sued in their capacity as members of a municipal corporation holding property in common for their private benefit.

P5. Defendants Selectmen of the Town of Sanford include those individuals holding office as Selectmen of defendant Town of Sanford between October 1997 and the present, including among others their chairman William Roberts, and are sued in their individual capacities.

P6. Defendant Richard Wilkins is and during the events detailed herein has been, an official of defendant town responsible for road maintenance within said town, sued in his individual capacity.

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1. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); page 15
2. *Allen v. McCurry*, 449 U.S., at 95; page 10
3. *Avery v. Powell*, 695 F.Supp. 632, 643 (D. NH 1988); page 26
4. *Blackburger v. United States*, 284 US 299; page 17
5. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-329 (1971); page 10
6. *Bureau of Taxation v. Town of Washburn*, 490 A.2d 1182, 1185 (Me 1985); page 21
7. *Caouette*, 484 A.2d 1111, 1113 (NH S.Ct); page 11
8. *Crist v. Bretz*, 437 U.S. 28 (1978); page 12
9. *Daigle v. City of Portsmouth*, 129 NH 561, 534 A.2d. 689; page 11
10. *Dowling v. United States*, 493 U.S. 342 (1990); page 11
11. *Downum v. United States*, 372 U.S. 734; page 12
12. *Ex Parte Young*, 209 U.S. 123 (1908); page 21
13. *Feliciano v. Barcelo* 497 F.Supp. 14 (D.P.R. 1979); page 25
14. *Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320 (10th Cir. 2000); page 26
15. *Gibson v. Berryhill*, 411 U.S. 564 (1973); page 10
16. *Glover v. New York* (1975, ED NY) 401 F.Supp 632 page 11
17. *Gomillion v. Lightfoot*, (364 U.S. 339) 81 S.Ct. 125, 130 page 29
18. *Hegarty v. Somerset County* 848 F.Supp. 257 (D.Me '94) page 22
19. *Inmob. Bor. Inc. v. Santiago* 195 F.Supp. 203 (D.PR '69) page 18
20. *Johnson v. Samson Constr. Corp* 704 A.2d 866 (Me '97);

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21. *Kovacs v. Cooper*, 336 U.S. 77 (1949); page 29
22. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 481; 102 S.Ct. 1883, 1898 (1982); pages 10, 11, 12
23. *Masonoff v. Dubois* 899 F.Supp. 782 (D.Mass. 1995); page 25
24. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972); page 21
25. *Monell v. NYC Dept. Social Serv.*, 436 U.S. 658 (1978); page 21
26. *Monroe v. Pape* 365 U.S. 167; page 21
27. *Montana v. United States*, 440 U.S. 147, 153 (1979); page 10
28. *Nestor Colon Medina & Sucessores v. Custodio* (964 F.2d 32, 1st. Cir. 1992); page 19
29. *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975); page 26
30. *Parratt v. Taylor* 451 U.S.,101 S.Ct. 1908, (1981); page 21
31. *Serfass v. United States*, 420 U.S. at 388; page 12
32. *State v. Carter* (444 A.2d 37, Me 1982); page 15
33. *Swierkiewicz v. Sorema*, U.S. Sup. Ct., 2002, 00-1853; page 14
34. *United States v. Causby*, 328 U.S. 256 (1946); page 29
35. *United States v. Cunan*, 156 F.3d 110; page 10
36. *U.S. v. Joselyn*, 206 F.3d 144, 151 (1st Cir, 2000); page 13-14
37. *U. S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569; page 12
38. *Ward v. Village of Monroeville*, 409 U.S. 57, 60; page 15

Statutes

Statutes of the United States
28 USC § 2072 (rule making power)
(pages 14, 19, 24, 28, 30, appendix I)
42 USC §§ 1983 to 1988 (Civil Rights Act)
(pages 3, 19, 28, appendix J)
Statutes of Maine
Title 14 MRSA §§ 8101-8118 (tort claims act)
(pages 6, 20)
Title 17 Chapter 91 § 2701, 2702 (nuisance)
(pages 28, 29)
Title 17-A Chapter 19 § 451 (perjury)

Other Authorities

The Constitution of the United States
Article III Sections 1, 2 (judicial branch) (p. 1)
Article IV Section 1 (full faith and credit)
Amendments V, XIV (pages 2, 19, 29, 30)
Maine Rules of Civil Procedure ("MRCP")
MRCP Rule 7(a) (answer required)
(pages 4, 6, 27)
MRCP Rule 8(a), 8(e) (conciseness) (p. 14)
Federal Rules of Civil Procedure ("FRCP")
FRCP Rule 7(a) (answer required)
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FRCP Rule 8(a), 8(e) (conciseness)
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FRCP Rule 23 (class actions)
(pages 25, 26, 28)
Federal Rules of Appellate Procedure ("FRAP")
FRAP Rule 32 (type volume limit)

Orders Entered

Date	Court	Item
5/24/02	U.S. Court of Appeals, First Ct. File No. 01-2756 (affirming dismissal)	Judgment
11/26/01	U.S. District Court, Maine 01-CV-208-PC (dismissal)	Order; Judgment
11/5/01	U.S. District Court, Maine	Magistrate
12/15/00	U.S. District Court, Maine 00-CV-286-PC (dismissal)	Order
10/2/00	Maine Law Court YOR-00-188 (affirming dismissal)	Decision
3/30/00	Maine Superior Court, York SS. CV-99-265 (dismissal)	Order
10/26/99	Maine Superior Court, York SS. RE-99-024 to RE-99-067 (dismissal)	Order
7/8/99	Maine Superior Court, York SS. RE-99-024 (impossible abbreviation)	Order

Jurisdiction

The judgment brought for review was dated 5/24/02; this petition is brought within 90 days of the date of judgment, in accordance with RSC Rule 13.1 and other provisions of the Rules of the Supreme Court.

Jurisdiction of the United States Supreme Court is conferred by Article III sections 1,2 of the Constitution of the United States; 28 USC §2106 confers jurisdiction to modify or reverse any judgment, decree, or order of court lawfully brought for review; 28 USC § 1254(1) provides for review by this Court of cases in the U.S. courts of appeals by writ of certiorari, under which jurisdiction is invoked in this case.

Provisions of the United States Constitution

Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV Section 1:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case with Pertinent Facts

This is a class action for civil rights which has never been heard in court, to abate a nuisance and obtain compensation for damages, initiated by the class of residents near the nuisance, in defense of their constitutional rights against the taking of their property interests for public use without just compensation; and their rights to due process and equal protection. Basis for jurisdiction in federal court of first instance is the federal issue, violations of 42 USC §1983.

Defendants have caused, maintained and extended a nuisance, the use of extremely noisy off-road hobby vehicles (ATVs, motorcycles, and snowmobiles) upon a former railbed to which defendant town claims title, which passes through a now residential area of the village of Springvale and town of Sanford. When these vehicles are nearby, plaintiffs cannot sleep, read, talk, study, listen to music, or relax; and are forced to close windows during the summer. Until this nuisance has been permanently halted, the Plaintiffs cannot enjoy their residences, and the campus of Springvale School now under renovation cannot be used for the purposes for which it was built. Efforts by plaintiffs and others to seek redress by petitions, polls, administrative and political means have been opposed by defendants, by means of harassment, threatening, massive vandalism, arson, and assault against the class representative and Springvale School, to obstruct justice and further deny their constitutional rights. Defendants have so damaged Springvale School with their crimes, and have so abused and threatened to abuse municipal power to prevent opening the school, that the school must be relocated to facilities beyond any powers of defendants.

This matter has never been heard in court. Prior state actions RE-99-024 and CV-99-067 in York county superior court of Maine were concise but complex pleadings dismissed with an impossible order to abbreviate them by 80 percent, by

a judge having personal and financial interest in the case, who refused to recuse himself (appendix G, H, and L).

Initial action RE-99-024 in York county superior court was pro se action by twenty individual plaintiffs, members of present plaintiff class, who formed a neighborhood association named as plaintiff. Despite the complexities of evidence and environmental and constitutional law in action against municipal defendant abusing abandoned railroad land and concealing its actions, entire pleadings were only 70 pages (*Complaint* 30 pages, 14,188 words, 12 point type, permissible under MRCP). Defendant town claimed reading such a long complaint was unreasonable burden, and refused to make answer as required by MRCP Rule 7(a) or to move for more definite statement as required by MRCP Rule 12(e). Instead, as in all subsequent action, it merely moved for dismissal (Joint Appendix E-1, U-1, W-1) with barrages of false or misleading statements about the format and contents of the complaint (e.g., false quotations using politically subversive or paranoid statements from other actions, and false contention that complaint was in 10 point and smaller type), diversionary legal fallacies, false citations, and false statements of law, parading the bizarre delusion that a small town in Maine has sovereign immunity to violate federal constitutional rights. These perjuries and absurd defenses were not dropped until the federal complaint.

The state court nonetheless made a highly improper order 7/8/99 (Appendix H), both dismissing the plaintiffs' association, forcing all twenty of them to individually sign every document, and ordering an impossible amendment, the abbreviation of the entire concise pleadings of 70 pages single-spaced to a mere 30 pages double-spaced (proportionate complaint could be only 3,040 words), a reduction of fact and argument exceeding 80 percent, which plaintiffs had stated was impossible and not required by the MRCP. No complex action can be litigated on such terms:

the legal profession could not operate under such limitation, and no such limit exists in the MRCP or FRCP. The initial abbreviation was filed as RE-99-067 and dismissed 10/26/99 (Appendix G) for noncompliance with the impossible order.

In each action, the defendants have used the time gained by these stalling maneuvers to harass, threaten, slander, and assault the plaintiff class representative, and to commit numerous acts of massive gang vandalism and arson at his charity school, directly and by soliciting and protecting such crimes by their corporate members, to deny the plaintiffs due process of law. The crimes are detailed in the *Complaint*.

Defendants have also obstructed due process by their extremely aggressive and ubiquitous dishonesty. Hardly a sentence in their pleadings is without some new lie about the facts or the prior course of proceedings, which has required the plaintiffs to make lengthy refutations of the new lies in addition to refutation of the fallacious arguments and previous lies of defendants. In oral argument, counsel for defendants has made so many outright lies that plaintiffs cannot respond to the lies in addition to presenting their own arguments in the time available. In addition, the defendants have made extensive use of smear tactics and back-door channels at the courts. It is this aggressive criminal conduct, complete disregard of rights, and ubiquitous dishonesty of the defendants and their counsel, which has resulted in longer than average Plaintiff pleadings and multiple civil actions.

The plaintiffs attempted once again in good faith to comply with the impossible abbreviation order, with no specific guidelines, and spent over 200 hours doing so, even during constant threat and harassment *in extremis* by defendants, including an unsuccessful rifle assault 11/21/99 by defendants on the office of the class representative while this work was in progress (*Complaint* fact 128). Strict compliance was of course impossible, and the additional defendant crimes had to be documented. There were no public guidelines, MRCP rules, or specific orders to guide

formatting, and a search of law databases revealed only a few extreme complaint-format cases. The action was filed again 12/01/99 as CV-99-265 (*Complaint* 15,696 words, 31 pages, 12 point type) in the same county court, with motion to recuse judge Fritzsche, a Sanford property owner (appendix L) and long time friend of one Sanford selectman. Fritzsche refused to recuse and dismissed the complaint 3/30/00 "with prejudice" on the false claim of excessive document length (Appendix F), an act of clear misconduct.

The dismissal was appealed to the Maine Law Court as YOR-00-188, where it was denied review (Appendix E) 10/2/00 as *discretionary*. This state denial of due process in defense of constitutional rights was an attempt to block the promised federal review of constitutionality of Maine's tort claims act, and to nullify the federal power to protect the rights of citizens. This brought the matter to federal court.

Action 00-286-PC was filed 10/10/00 in U.S. District Court for Maine (*Complaint* 12,435 words, 40 pages, 12 point type, in full compliance with FRCP). It was abbreviated only by introducing unfair risk: holding land title arguments aside for contingent use, and including materials by reference to prior actions.

Again the defendants refused to Answer the complaint as required by the FRCP. Although they had claimed in the state action to be *unable to understand or answer the claims* so as to gain dismissal, defendants now claimed that these were *identical to the new claims* so as to argue res judicata. Although they had claimed immunity in the state action, for the town as having purely governmental capacity, they now asserted identity of the non-immune town corporate capacity. These contradictory claims in the documentary evidence, made to influence the course of official proceedings, are perjuries under Maine and federal law. Plaintiffs objected that the res judicata defense is collaterally estopped by these perjuries, precluded by defendants' failure to Answer any prior complaint, and without legal merit because none of the

criteria of res judicata are met by the new claims, which are distinct in kind, continuing torts, and between new parties.

The defendants increased harassment and vandalism against the plaintiff class representative. In December 2000 defendants made a series of gang vandalism attacks causing over $500,000 damage to the home, office and charity school of the class representative (Complaint facts 129 -132, exhibits E-58 and E-59). Plaintiffs filed a Motion for Temporary Restraining Order with Affidavit. Immediately there was another gang vandalism attack, in which the Sanford police stood by as gang members walked away from the building they had just ruined (Complaint fact 132). From a freezing office with its windows smashed out, Plaintiffs filed another urgent Motion for Temporary Restraining Order, whereupon judge Carter dismissed the action 12/15/00 (Appendix D) with the paradoxical remark that "the Complaint fails to allege facts showing the existence of any subject matter jurisdiction of this Court over any of the putative claims contained therein," ignoring numerous references in the Complaint to violations of constitutional rights, and the complete treatise of the pertinent Civil Rights law in the *Memorandum of Law* (Joint Appendix B-27) *Jurisdiction and Cause of Action*. During this procedural interference with civil rights action, the total damage done by defendants' gang vandalism at Springvale School exceeds the cost of supporting over 200 orphans for their entire childhoods.

The present action 01-CV-208-PC (*Complaint* 61 pages, 18,987 words double-spaced in 12 point Roman type) was filed 8/21/01 in the same district court; it itemizes the constitutional rights violations with counts headings. Although longer than any prior complaint due to documentation of the crime campaign of defendants, the defendants dropped their format claims based solely upon perjuries, and merely restated their claims of res judicata based solely upon perjuries, refusing to make the required Answer which the complaint has never received. The same

judge 11/26/01 (Appendix B) accepted over clear objections, the recommendations of a district magistrate dated 11/05/01 (Appendix C), based on poor quality argument, consisting of misstatements of fact and law, incorrect citations, and logic errors, distorting every point of law in a disgraceful effort to sweep away this clearly legitimate complaint against a municipality. The district court struck the perjury counts on pretext, denied counsel and class determination for lack thereof, and dismissed the action as res judicata, using false criteria of claims, parties and prior judgment on the merits. Each of these decisions conflicts directly with rulings of this Supreme Court, and the U.S. courts of appeals generally, and conflicts with documentary evidence and accepted practice. This has been the consistent and dismal civil rights record of the district court for Maine. This degree of judicial error placed an inordinate burden upon Plaintiffs to defend their rights, and required numerous errors of law to be presented for review on appeal.

Appeal no. 01-2756 was filed 12/17/01 in the U.S. Court of Appeals for the First Circuit; the judgment of 5/24/02 (Appendix A) merely affirmed the district court judgment without argument, failing to consider any of the issues of law presented for review.

The record of this case clearly shows the abdication of duty of these lower courts to defend the constitutional rights of citizens, in favor of unconstitutional doctrines of judicial convenience. To allow such a judgment to stand is to sanction the denial of federally protected rights by state courts on discretionary procedural pretexts, without trial or review. The Declaration of Independence urges the removal of such abuses, and our nation's history shows that the denial of these fundamental rights leads to disaster. Let the defense of constitutional rights be taken up again, by those with the integrity to maintain what America has won.

Argument for Certiorari

The petition presents several questions of procedural interference with civil rights actions. As no findings of fact nor application of principles of law have been made in this matter, except upon procedural questions, these are not the basis of this petition.

The jurisdiction of the Supreme Court is traditionally invoked where a decision of a U.S. court of appeals or state court of last resort has decided an important federal question in a manner inconsistent with either prior rulings of this court, another court of appeals or state court of last resort, or accepted practice; or where such question has not been, but should be decided by this Court. (Rule 10).

Questions 1 through 9 deal with the res judicata decision. These procedural questions merit certiorari due to conflict of the judgment under review with prior decisions of this Court per Rule 10(c.), and with decisions of the U.S. courts of appeals and state courts of last resort per rule 10(a) and 10(b); several more specific questions also have not been decided by this Court, and should be decided per rule 10(c.). It is sufficient to decide one of these questions to reverse the res judicata decision; all must be reached to affirm, because each criterion is violated in several ways by the judgment.

Questions 2 through 5 and 10 also merit certiorari to prevent sanction by the judgment under review of such departure from the accepted course of judicial proceedings, as to call for exercise of this Court's supervisory power.

Questions 10, 11, 12, and parts of questions 6 and 9 concern separate decisions of the judgment under review, presenting issues not yet decided, but which should be decided, by this Court per Rule 10(c.).

Questions of Conflicting Decisions on Res Judicata

Questions 1 through 9 deal with abuse of the judicial doctrine of *res judicata* so as to preclude the defense of constitutional rights. Decision of one of these questions is sufficient to reverse; all are needed to affirm.

The standard of *res judicata* set forth in *United States v. Cunan* (35) (1st Cir. 1998) defines three criteria, *all* of which must be met for preclusion of *any* claim on grounds of res judicata in prior action:

(1) identity of parties;

(2) identity of causes of action; and

(3) prior final judgment *on the merits* of the claim.

In each of these areas, the judgment under review conflicts with decisions of this Court, the U.S. courts of appeal, and state courts of last resort.

Conflicting Decisions on Prior Judgment (Questions 1 - 5)

The standard of review for prior judgment *on the merits* under res judicata (questions 1 through 5) was set by this Court in *Kremer v. Chemical Construction Co.* (22):

> "the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." citing *Allen v. McCurry* (2); *Montana v. United States* (27); *Blonder-Tongue Labs v. Univ. of Ill. Found.* (5).

The Court has held that

> "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana v. United States* (27) at 164; cf. *Gibson v. Berryhill* (15)(1973).

While 28 USC §1738 normally requires accordance of full faith and credit to state proceedings intended to have preclusive effect, as noted in *Kremer* (22) (question 4)

> "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."

A state doctrine of discretionary dismissal of civil rights action is clearly constitutionally infirm (question 4), and like a state judicial doctrine of claim preclusion, lacks the authority and admissibility of an act of the state (question 5).

These Supreme Court rulings are consistent with the decisions of the courts of appeals, as noted by this Court in *Dowling v. United States* (10) (1990)

> "The Courts of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding."

This is also consistent with the decisions of state courts of last resort, e.g. *Caouette* (7) (NH S.Ct), cf. *Daigle v. City of Portsmouth* (9) 689, 693 (1987):

> "The preclusive effect of collateral estoppel extends only to the matters that were actually litigated in the earlier case." "An issue is actually litigated when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined."

Finally, this standard is consistent with numerous decisions of the district courts, that

> "Motion for summary judgment based upon the doctrine of res judicata and collateral estoppel must be denied where neither causes of action alleged by plaintiffs nor issues raised by such causes were determined in prior litigation."
>
> *Glover v. New York* (16)

And even defendant town admitted that "the court can hardly be asked to determine whether there is a dispute between the

parties regarding any genuine issues of material fact until after the complaint has been answered." (objection to plaintiffs' motion for summary judgment in CV-99-265, at p. 3).

Although *Kremer v. Chemical Construction Co.* (22) would appear to have settled questions 1 to 5, the present case shows that "full and fair opportunity to litigate" can still be interpreted to deny due process on any pretext, including even a state decision that reading over 30 pages is too much work to protect the constitutional rights of a class of citizens. Clarification on the related questions of constitutionally infirm procedure would be of great value to the people of Maine.

Note that "full and fair opportunity" has included dismissals with *voluntary* "prejudice" by laches or consent; the magistrate incorrectly relied upon these cases (35 et al).

The related question whether jeopardy attaches to a prior proceeding discontinued before trial (question 1), was reviewed by this Court in *Crist v. Bretz* (8) (1978) citing its ruling in *Downum v. United States* (11)

> "the Downum case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn." citing *United States v. Martin Linen Supply Co.* (37) 564, 569; and *Serfass v. United States* (31) at 388.

Hence a proceeding dismissed before answer or discovery cannot be construed as basis for a plea of former jeopardy, and the judgment under appeal conflicts directly with these prior rulings of this Court and the U.S. courts of appeals.

In this case, the prior state-court complaints were dismissed without trial or even answer, on the pretext that it was too much work for the defendants to answer pleadings over 30 pages (question 3, appendix G), of lesser size than any of the subsequent federal pleadings to which defendants did not even raise the objection. None of the claims were recognized by the court, answered by defendant, tried, nor even mentioned in any prior judgment (question 1). No finding was made of any irremediable defect due solely to

plaintiffs which precluded due process (question 2), nor was any argument made that discretionary procedural dismissal without trial would somehow discharge the due process requirement (question 4) or constitute judgment on the merits of the claims not allowed (question 5). Neither defendants nor lower courts offered any proof that any present or prior claim "was actually decided in the first proceeding." Therefore no prior claim was "properly raised", "submitted for determination", "determined" nor "actually litigated," hence "neither the causes of action alleged by plaintiffs nor issues raised by such causes were determined in prior litigation," and hence "judgment based upon the doctrine of res judicata and collateral estoppel must be denied." The plaintiff class was given no "full and fair opportunity to litigate its claims in the original action," there was no final judgment on the merits of the prior nuisance claims, and res judicata could not be invoked, *even if all claims and parties were identical*, of which none are.

The Court has not yet ruled upon the allowable criteria for procedural dismissal of civil rights complaints (question 2); nor upon the use therein of criteria such as length of pleadings (question 3); nor the effect therein of refusal of an interested judge to recuse (part of question 4). Related rulings of this Court and the courts of appeals have been made, with which this judgment conflicts gravely.

Permanent denial of process without trial where due process is guaranteed by the federal constitution requires showing that no other course was possible (question 2): that circumstances due *solely* to plaintiffs *precluded* process, and that the defect was and must always remain *irremediable*. None of these highly unlikely circumstances is remotely applicable to this case, nor even asserted in prior judgment, and in any event such finding is subject to *de novo* review upon reassertion of claim.

> "Where it is contended that a district court applied an incorrect legal standard, that contention is reviewed

de novo." *U.S. v. Joselyn* (36) 151 (1st Cir, 2000) Hence no constitutional rights claim, implicit or explicit, may be dismissed "with prejudice" without trial or review, whether by rule or discretion, because this denies due process and conflicts directly with 28 USC § 2072. Were this not so, there could be no federal guaranty of civil rights.

Prior state dismissal for length of complaint fails these criteria and therefore denied due process and was not judgment on the merits nor admissible as prior jeopardy: the 31 page length (with 29 page *Memorandum of Law*) was due to factors entirely beyond the control of plaintiffs (number of offenses, concealment by defendants, and complexity of law); the length in no way precluded process (the claims were stated concisely); and length is not irremediable even when unnecessary. The county court order to remove 80 percent of material was clearly impossible, precluded by Rule 8(e)(2), and no guideline was given because the court knew that this impermissibly required deleting claims and facts.

The present case shows that, without ruling by this Court, a state court can dismiss any complex case on grounds either that reading it is too much trouble for defendants (appendix G), or that it was abbreviated too much to make the case. Almost no civil rights case involving environmental law, numerous parties or offenses, or complex liability could be conducted in some jurisdictions if such discretionary state dismissals are sanctioned (question 4).

This Court has very recently affirmed (*Swierkiewicz v. Sorema* (33)(2002) that sufficiency of complaint requires no more than the FRCP Rule 8(a) "short and plain statement of the claim," to "give [defendant] fair notice of what [plaintiffs'] claims are and the grounds on which they rest." That rule does not preclude additional material, nor does the presence of many claims, copious evidence or several arguments argue that a complaint does not contain a short and plain statement of each claim (see *Complaint* Counts, and Statement of Claims). FRCP Rule 8(e) prohibits limitation of number of

claims. Length is not an issue in sufficiency of complaint, and dismissal on that ground therefore denies due process. Even in Maine, a complaint is held constitutionally adequate

> "if it contains such plain, concise and definite allegations of the essential facts constituting the offense as shall adequately apprise a defendant of reasonable and normal intelligence of the act charged, enabling him to defend himself and, upon conviction or acquittal, to make use of the judgment as the basis of a plea of former jeopardy, should the occasion arise." *State v. Carter* (32) (Me 1982)

Therefore the act of stating the defense of former jeopardy proves that the prior complaint was constitutionally adequate, that if dismissed for such defect it was denied due process and is not prior judgment on the merits, nor admissible under full faith and credit, and hence precludes the res judicata defense. Under these circumstance the res judicata defense constitutes perjury of defendants, on documentary evidence.

Regarding the due process effect of refusal of the interested state-court judge to recuse (part of question 4) as an owner of property within defendant town (appendix L) and long time friend of a selectman thereof, this Court has ruled that a judge having financial interest

> "acted as 'a judge in his own case.' His interest in this case was 'direct, personal, substantial, [and] pecuniary,' and 'violated appellant's due process rights.'" *Aetna Life Insurance Co. v. Lavoie* (1) citing *Ward v. Village of Monroeville*, (38) 57, 60)

The documentary and other evidence in this case establishes the financial and personal interest of the state-court judge, thus invalidating prior judgment for res judicata purposes.

The judgment under review has allowed a local judge with a financial and personal interest in the case to substitute his concept of "full and fair opportunity to litigate" for the judgment of the Supreme Court. The district magistrate

ignored the body of law presented by the Plaintiffs, and merely asserted without argument (appendix C at 6) that:

> "dismissal with prejudice of the prior state-court action does constitute prior judgment on the merits"

and (appendix C at 8):

> "that the dismissal resulted from procedural violation rather than a determination... makes no difference."

But in fact, as shown, every accepted standard of prior judgment on the merits was violated by the state dismissal, sanctioned by this prejudiced magistrate so as to falsely invoke res judicata against the defense of constitutional rights. The judgment under review directly conflicts with decisions of this Court and the U.S. courts of appeal, sufficient grounds for certiorari of questions 1 through 5. The supervisory power of the Court should be exercised to correct this abuse.

Conflicting Decisions on Identical Claims (Questions 6, 7)

On the second criterion of res judicata, identity with a claim in prior action, there are further grave conflicts between the judgment under review and decisions of this Court and the U.S. courts of appeals (questions 6 and 7).

All of the claims of the present case are new kinds of tort (Counts II, III, and VI) or torts continuing from prior actions (Counts I, II, IV, and V), distinct from prior claims.

But in denying claims of new kinds of tort, the affirmed magistrate decision misinterprets the "same transaction" claim definition of *Johnson v. Samson Constr. Corp* (20) to argue that any factual overlap at all renders claims identical, so that all later torts involving the same offender, victim, location, or time period would be res judicata. This interpretation is of course legally incorrect: the bank robber is not acquitted due to prior litigation involving only the same robber, same bank, or same day: the facts must be identical. In fact, the citations in *Johnson* (20) contradict

any generalization of claims: these are all cases of multiple proceedings on identical facts. Note that a judicial doctrine of claim identity lacks the authority of an act of the state; neither is admissible where constitutionally infirm. Using a "same transaction" definition like that of Maine, this Court has held that even in criminal res judicata where preclusion is stronger, the factual overlap must be complete for identity of claims

> "Two offenses are considered the same offense for double jeopardy purposes unless each offense requires proof of a fact that the other does not."
> *Blackburger v. United States* (4)

Hence any new claim *or* continuing tort, requiring proof of a new fact, is distinct from prior claims with overlapping facts, and fails the "same transaction" test by which a res judicata defense could be made. Although there are cases where claims arise improperly from transactions already litigated, there is no rational argument to apply such a definition here.

Count II concerns crimes in which defendants are principals and accessories. These crimes were committed during or after prior state proceedings, are not claims arising from the nuisance subject itself, and require proof of the crime facts, not the nuisance facts: hence the claim is distinct. Count III concerns denial of due process by defendants in conduct of prior proceedings, not arising from the subject nuisance itself, and requires proof of the conduct facts, not the nuisance facts. Count VI (*Counterclaim*) specifies acts of perjury by defendants, not arising from the subject nuisance itself, and requires proof of the perjury facts, not the nuisance facts. These new kinds of tort require proof of facts distinct from prior claims and cannot be precluded, ***even if all parties were identical and prior judgment had been rendered on the merits of the nuisance claims,*** which is not the case.

The magistrate argument to deny the continuing tort claims also conflicts directly with other decisions of this court and the courts of appeals. This Court's decision in *Blackburger v. United States* (4) excludes continuing tort

from "same transaction" claims as requiring proof of new fact, that the tort continues. The same principle is stated in the challenged state definition of *Johnson v. Samson Constr. Corp* (20): claim preclusion requires that "the matters presented for decision in the second action were, or might have been litigated in the first action" which cannot be true of a claim that tort has continued since the first action.
Even the court of appeals for the First Circuit itself has held in *Inmobiliaria Borinquen v. Santiago* (19) that:

> "Complaint of landowner alleging that actions of officials ... constituted a taking of property without just compensation in violation of the Civil Rights statutes alleged a continuing tort situation."

On continuing tort the magistrate merely states falsely that (Appendix C at 8) allowing any continuing tort claim would

> "allow a plaintiff to bring successive claims of nuisance after repeated holdings by the courts that the activities at issue did not constitute a nuisance."

At best, this contention is made in ignorance of law. Claims of continuing tort are routinely litigated, and adjudication is final on such torts up to the date of trial, unless the judgment comprehends future damages, as in the case of compensation for takings for public use. The hobgoblin of infinite litigation is the only argument offered to deny the continuing tort claims, and it could not be more clearly false and in conflict with other appeals court decisions.

Note as above that the defendants' assertion of identical claims in prior action (so as to claim res judicata) in which they claimed inability to read or answer the claims (so as to gain dismissal) constitutes perjury, collaterally estops the res judicata defense, and proves prior complaint sufficient and that prior proceedings denied due process. Therefore prior judgment was not on the merits and is inadmissible in federal court, precluding the res judicata defense.

The most significant part of question 7 is the constitutionality of "same transaction" definitions of prior

claim, in action under the Civil Rights acts. The argument applies to both state and federal definitions, and federal admissibility thereof, and is of the first importance in the defense of constitutional rights against procedural dismissals.

A true and present abridgment of constitutional rights *cannot be precluded from litigation under any judicial doctrine, precedent, rule, or procedure,* and proper allegation thereof is always a present cause of action, absent prior final judgment of no such abridgment upon identical facts.

Such preclusion is directly prohibited by the Constitution, the Civil Rights Acts, and 28 USC § 2072. Such abridgment of rights is not within the powers allocated to the judicial branch by Article 3 of the Constitution of the United States, is directly prohibited to the judicial branch by the terms of 28 USC § 2072, is not within the powers of the states under Amendment XIV, and is prohibited to all persons whatsoever by the terms of 42 USC § 1983 et seq. These prohibitions could not be more inclusive, nor more firmly grounded in United States law.

If construed to preclude litigation against a present abridgment of constitutional rights, any doctrine, including a "same transaction" test of identical claim, is unconstitutional.

> "Plaintiff's failure to raise constitutional claims in Puerto Rico courts did not, under the doctrine of claim preclusion, bar constitutional claims in a § 1983 action." *Nestor Colon Medina et al v. Custodio* (28)

The cited Maine definition violates Amendment XIV as applied to civil rights action, in abridging the constitutional rights of citizens for purposes of judicial economy.

Conflicting Decisions on Identical Parties (Questions 8, 9)

On the final criterion of res judicata, identity of parties, further very serious conflicts exist between the judgment under review and decisions of this Court, the courts of appeals and state courts of last resort (questions 8 and 9).

Is the town of Sanford sued in prior action in its purely governmental capacity of public duty in public exigency (as it claimed for sovereign immunity) identical with the town sued in this action as private corporation holding property in common for benefit of its members (question 9)?

This issue is analyzed in five sections within the Plaintiffs' *Memorandum of Law* under the headings Jurisdiction and Cause of Action (p. 27) and Liability of Municipality (p. 35). The complication is due to defendants' claim of sovereign immunity to violate constitutional rights.

Maine law has long recognized the dual capacity of municipalities as private corporations owning property in common for benefit of their members; plaintiffs show that only the governmental capacity has immunity. In the prior state-court action, defendant town of Sanford has in claiming sovereign immunity asserted purely governmental capacity, hence that town of Sanford in its non-governmental capacity is a distinct defendant. If prior defendant town had purely governmental capacity, then some other entity *with the same name* holds property, employs persons, and performs corporate acts without public duty in public exigency. Defendant cannot have it both ways: either it is not immune or not identical with its non-immune corporate capacity. If it were not so, the tort claims act of Maine and nearly every state would be unconstitutionally over-broad (question 9).

The officers, counsel, and statements of these entities are the same; hence each is constructively aware of the other's claims and collaterally estopped by the immunity claim from claim of identity, which constitutes federal perjury of both. This perjury was intended to influence official proceedings and did so influence them: finding of perjury should be made.

The judgment ignores both the dual capacity and the perjury of defendants, although this precludes the defense, and so the judgment contradicts the documentary evidence.

If, *arguendo*, the town had no non-governmental capacity, then some further entity with the same officers holds

property, employs persons, and performs non-governmental acts in its name, referred to in this action as the Inhabitants of the town of Sanford, sued in their non-governmental corporate capacity, or as a defendant class. This class certainly exists and is distinct from prior defendant. The magistrate decision ignores this, merely citing (appendix C at 5) *Bureau of Taxation v. Town of Washburn* (6) where the archaic Maine usage "Inhabitants of" was opined to be superfluous if the intention was only to name the town, which is immaterial to the usage here.

In ignoring collateral estoppel and non-governmental defendants, the judgment under review conflicts with other decisions of courts of appeals, too numerous to list here.

On identity of the individual defendants with the town of Sanford (question 8), again the magistrate attempts to substitute for federal civil rights law, a state precedent which would preclude the defense of constitutional rights, again using *Johnson v. Samson Constr. Corp* (20) (appendix C at 4), which defines res judicata so as to bar action where "the same parties or their privies are involved in both actions" and merely argues (appendix C at 5) that the individual defendants are privies of their employer town of Sanford. The magistrate claims falsely that the complaint alleges "no acts of these individuals that were beyond the scope of their employment" and argues falsely that individual acts pursuant to municipal policy form "no basis whatsoever for individual liability." That argument is without merit in civil rights law.

The individual liability of state and local officials for acts exceeding legislative authorization is long established. The judgment under review (and the magistrate citation) conflicts directly with numerous rulings of this Court and of the U.S. courts of appeals. See this Court's rulings in *Monell v. New York City Dept. of Social Services* (25) (1978) overruling in part *Monroe v. Pape* (26); *Parratt v. Taylor* (30) (1981); *Mitchum v. Foster* (24) (1972); *Ex Parte Young*, (12) (1908); and lower court decisions (not indexed)

including *Tauvar v. Bar Harbor Congreg'n of Jehovah's Witnesses*, 633 F.Supp. 741, 746-747 (D.Me. 1986); *Voutour v. Vitale*, 761 F.2d 812, 819 (1st Cir. 1985); *McGillicuddy v. Clements* (746 F.2d 76, 77, 1st Cir. 1984); and many others.

The district court judge (Carter), in adopting the magistrate decision, contradicts his own decision in *Hegarty v. Somerset County* (18) 257 (D.Me 1994) wherein

> "Officers could not reasonably have believed that their act was justified by exigent circumstances .. and were not entitled to qualified immunity in actions brought under the Maine and federal Civil Rights Acts."

Officials may not knowingly violate civil rights with impunity under the Civil Rights acts: may it ever be so.

None of the present defendants is identical with the prior defendant town of Sanford in its governmental capacity, and no argument is made in the judgment that they are, except the false argument on individual defendants. Therefore the criterion of identical parties in prior action is absent, and res judicata cannot be invoked, *even if the claims were identical and prior final judgment had been rendered on the merits of the prior nuisance claims*, which is not the case. The judgment conflicts seriously with decisions of this Court and the courts of appeals in asserting that the prior party is identical with all parties of the present action.

Conclusion on Res Judicata

The magistrate decision offers no argument that there was any prior judgment on the merits of even the prior claims; provides no acceptable argument to consider any of the claims identical to prior claims; and provides no acceptable argument that any of the parties are identical in prior action. *None of the three required criteria of res judicata are met by any of the claims*; yet the magistrate asserts that all of these criteria are met by all of the claims. The magistrate argument is no more than charade, a

contemptible excuse to violate the Constitution, which has already cost the future of hundreds of orphans in damages to Springvale School. No other argument was offered for the res judicata defense in either the district court judgment or the appeals court judgment under review.

The decisions issued in this case have sought to prevent enforcement of the Civil Rights acts, under judicial doctrines twisted so as to be repugnant to all responsible citizens, and in violation of the powers of the states and of the Judicial Branch. The law should be corrected by repudiating the false doctrine of arbitrary procedural dismissal of civil rights cases, and the false doctrine that denial of due process triggers res judicata. Without such correction the judicial proceedings of Maine in civil rights matters are so deficient as to fail the standard for preclusive effect in federal courts. The grave and pervasive conflicts of the judgment under review with the decisions of this Court, the U.S. courts of appeals and state courts of last resort on the questions of res judicata (questions 1 through 9) call for certiorari: the res judicata decision of the judgment should be reversed.

Questions of Departure from Accepted Proceedings

The argument for certiorari on questions 2 through 5, and 10 is also based in part upon sanction by the court of appeals or state court of last resort, of such departure from the accepted course of judicial proceedings, as to call for an exercise of this court's supervisory power per rule 10(a).

The Court's guidance is needed to prevent the sanction of discretionary procedural dismissals of civil rights complaints, upon any criteria not delineated by this court (question 2) including length (question 3), whether by court of appeals or state court of last resort (question 4); to prevent sanction of claim preclusion without due process (question 5); and to prevent sanction of the striking of civil rights claims on pretext (question 10).

The remaining questions (except 12) may also warrant certiorari as rule 10(a) procedural departures, although argued as decisions in conflict per rule 10(a), (b) and (c.).

As argued above, the present case shows that in 2002 a U.S. court of appeals has sanctioned aberrant procedural interpretations which deny due process in civil rights matters, in direct violation of the Constitution, the Civil Rights Acts, and 28 USC § 2072 which explicitly prohibits such rulings. After over two hundred years of development, the law of the United States is quite clear on this point: the interpretation of judicial doctrine or procedural rules to deny constitutional rights is simply not within the powers allocated by the Constitution to the Judicial Branch. The procedural decisions of the judgment under review should be reversed.

Questions not yet Decided by this Court

Questions of Perjury within Questions 6 and 9

The Court has not ruled specifically upon the effect of defendant perjuries of essential material fact between present and prior action, upon the operation of *res judicata* (part of questions 6 and 9). The present case shows that a documentary defendant perjury that it could not read and answer a prior complaint (so as to gain dismissal), but that it has later understood it (so as to assert res judicata), can still be credited in a U.S. court of appeals. The defendants' second perjury on the documentary evidence, that the town of Sanford in prior action had purely governmental capacity (so as to plead immunity) but that in the present action its non-governmental capacity is identical (so as to plead res judicata), is also ignored in this judgment. Each of these perjuries in itself independently precludes the res judicata decision of this judgment by collateral estoppel. The district court went so far as to strike the perjury counts on pretext

(question 10) to conceal these glaring defects. Such travesty calls for decision of these questions by this Court.

Question 10

Apparently the Court has not ruled on question 10, whether a civil claim of perjury material to adjudication may be stricken on pretext, that it also describes a crime. In this case, the criminal claim could only be prosecuted by local district attorney on complaint of police employees of the municipal defendants charged in the stricken perjury claim, made to influence the course of proceedings. The striking without argument of a claim of perjury also solidly establishes prejudice of the district court as the basis of the judgment under review. The question is very significant in cases of procedural interference with civil rights actions.

Question 11

The Court has not yet ruled on the effect upon the due process guarantee of the requirement and denial of counsel and denial of FRCP rule 23 class determination for lack thereof; an area of conflicting decisions among the district courts and the courts of appeals (question 11).

The magistrate argument is limited to pro se legal representation of a class; the judgment makes no argument.

Counsel is not required for class actions under the Maine Rules of Civil Procedure, the Federal Rules of Civil Procedure, nor the local rules of the Maine district court or the First Circuit court of appeals. Decisions on this point have varied, resulting in disparity between jurisdictions in the right to due process in certain cases. The judgment under review conflicts, e.g., with the certification of class actions by pro se prisoner representatives with minimal legal experience, as in *Feliciano v. Barcelo* (13) and *Masonoff v. Dubois* (23).

No simple standard of review for adequacy of legal representation has emerged: FRCP (a)(4) requires that a class representative (with or without legal counsel) must "fairly and adequately protect the interests of the class." The magistrate merely cites three cases (appendix C at 2) and claims that counsel is always required. But the magistrate did not fairly and adequately read the cases: only one of them argues for legal counsel, and that is a special case. The cited textbook does not cite *Fymbo v. State Farm Fire & Cas. Co.* (14) and *Oxendine v. Williams* (29) as the magistrate suggests: in fact those cases merely cite the textbook, like the magistrate, with no argument whatsoever, and the textbook merely opines that a "layman" could never adequately protect any class. If laymen looked no further than magistrates at their citations, it might be so. But these citations are no more than prejudice disguised as precedent. The cited *Avery v. Powell* (3) held that a pro se prisoner could not protect the interests of a class, but only because prisoner was unable to deal with "complex statistical and medical evidence" involved in an action for damages due to emerging health effects of secondary smoke inhalation.

In contrast, the present case involves no complex data: the class is well defined, the entire class was polled, a good percentage responded, the results were tabulated in their entirety (appendix M), and the conclusion was nearly unanimous: in fact, nearly every respondent was a plaintiff in the original action. Hence the only cited criterion of pro se adequacy does not apply.

The magistrate merely asserts without argument (appendix C at 2) that counsel should be required due to "the nature of the claims set forth in the complaint and the sweeping scope of the relief sought." The scope of relief is immaterial: the magistrate again shows concern to protect defendants rather than the class. Preparation by the class representative has proven adequate to the nature of the claims. The magistrate seeks counsel to benefit defendants.

There is no apparent inadequacy in basic legal ability of plaintiffs' pro se representation: the pleadings have been concise and well organized; the citations on point; and the rules of court have been respected. In contrast, defendants' counsel has missed many deadlines; failed to answer the claims; failed to answer the questions of law; failed to make material citations; and has shown little understanding of FRCP Rules 7, 8, 11, 12, and 23, in addition to submitting barrages of lies and diversionary fallacies (including the magistrate citations) in lieu of acceptable pleadings. The plaintiffs' pro se representative has exceeded this standard.

There is no lack of vigor in plaintiffs' pro se class representation: the interests of the class have been carefully and energetically prosecuted from efforts to obtain private, administrative, and political solutions, through superior court and the state court of last resort, to federal district court and the court of appeals on some 30 issues of constitutionally infirm procedure, in addition to researching and writing cogent treatises in the *Memorandum of Law* upon nuisance, municipal liability, eminent domain, and taxation. The failure of those courts to respect the constitutional rights of the plaintiffs, and the extensive and systematic crime and smear campaigns of defendants against the representative over the several years of those actions, have not deterred prosecution to this Supreme Court. The record suggests qualification to "vigorously and adequately protect the interests of the class."

Adequacy of class legal representation must be judged relative to the alternatives. Plaintiff class poll respondents have authorized this action and cannot afford an attorney (appendix N). Where it is unlikely that other class representatives will come forward with counsel, denial of counsel and refusal to certify the class for lack thereof subverts the purpose of protecting the interests of the class, denying the class due process altogether.

Further, the witness tampering and crimes of defendants against plaintiffs whom they have identified, has

demonstrated the necessity of conducting this action as a class action. The history of this case shows that the rule 23 opposition is the identical stratagem behind the crime and the demand for impossible abbreviations: defendants are motivated solely by the illegal intent to obstruct justice. The other rule 23 requirements not addressed in the judgment under review are fully met by this action.

Decisions requiring counsel, which preclude meritorious class actions by adequate pro se representatives, where no subsequent action by the class is likely to have counsel, have violated constitutional guarantees of due process. Even the worthwhile goal of judicial economy cannot alienate constitutional rights. In cases where class representatives lack ability to protect the interests of the class, counsel should be appointed; otherwise counsel should be waived and the pleadings construed with technical favor, to preclude constitutional violation.

The magistrate decision (appendix C at 1,2) urging denial of counsel and class determination for lack thereof, and urging dismissal, seeks to deny due process, to illegally raise the bar against class actions in defense of constitutional rights, in violation of 28 USC § 2072 and 42 USC § 1985, rather than to further justice by making proper Rule 23(c.) determination of actions which may best be conducted as class actions. This decision of the judgment is a procedural attack upon the rights of citizens, which should be reversed.

Question 12

This Court has not yet ruled upon the common law status of private nuisance created by noisy off-road hobby vehicles (question 12), wherein the state courts have provided widely varying protection of property rights in response to recent technology. The problem of noise pollution and property damage by ATVs, snowmobiles, and off-road motorcycles has emerged across the nation in the last decade,

as the most serious problem affecting outdoor recreation and residential land use. This problem often surprises those affected, that a "mere nuisance" precludes essential use of private property and vacation time, and damages the value of residential investments.

This Court has held in *Kovacs v. Cooper* (21) that operation of a "loud and raucus" sound truck is not protected speech and can be a nuisance. The Court has affirmed in *United States v. Causby* (34) that frequent and regular flights of army and navy aircraft over private land at low altitudes constitutes a taking for public use. Numerous cases in the courts of appeals and state courts of last resort, as well as in the lower courts (see *Memorandum of Law* in this action), have established that high noise levels and the use of these specific vehicles near residences constitutes a private nuisance, and that municipal acts permitting such nuisances constitute takings of private property for public use. However, these rulings are not consistent, such that there has arisen a civil rights disparity from State to State.

The emergence of cases like the present one, of actual state obstruction of actions asserting the Amendment V right against takings by nuisance, presents the need for guidance to ensure consistency of decisions under the Civil Rights act.

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally-protected right."
> *Gomillion v. Lightfoot* (17)

Decision of the common law status of this nuisance will allow state nuisance statutes to operate as intended, and just compensation will be encouraged by clarification of the circumstances under which such nuisance has the effect of a taking for public use. The several issues are presented in full in the *Memorandum of Law* in this action.

Preclusion of Federal Liability

Certiorari further affords the federal government the means to preclude financial liability for sanction of defendants' taking of the property rights of the plaintiffs in the lower court action. The question may fairly be asked, whether proscribed judicial procedure or doctrine, having the effect of precluding the defense of constitutional rights, subjects the United States to liability for just compensation for the taking of private property thereby caused, as in the case of executive agency takings. The rule making power of the Judicial Branch is circumscribed explicitly by 28 USC §2072(b) to rules "which shall not abridge, enlarge or modify any substantive right" such as the plaintiffs' Amendment V and Amendment XIV rights in property and rights to due process and equal protection so clearly violated by the defendants, a violation sanctioned by the judgment under review. No legal doctrine, definition, precedent, rule, or procedure can nullify constitutional rights. Poor interpretation of doctrine and rules by the district court has exposed the federal government to liability as the principal agent in the deprivation of protected rights by proscribed procedural defects, for which just compensation may require tens of millions of dollars. In the Court of Claims, it is possible that the present defendants might evade liability, whereas they are still exclusively accountable in this action.

For Petitioner and Plaintiff Class:

_____

John S. Barth, pro se,
Petitioner and Plaintiff Class Representative
Dated this _____ day of June, 2002

Appendix A: Judgment of U.S. Court of Appeals

United States Court of Appeals
For the First Circuit

No.01-2756

JOHN BARTH,
Plaintiff, Appellant

v.

SANFORD, TOWN OF; WILLIAM ROBERTS, in his individual capacity; RICHARD WILKINS, in his individual capacity; SELECTMEN OF SANFORD,
Defendants, Appellees.

Before
Boudin, Chief Judge,
Stahl, Senior Circuit Judge,
and Lynch, Circuit Judge.

JUDGMENT
Entered: May 24, 2002

Plaintiff John Barth appeals from the denial of his request for class certification and from the dismissal of his federal complaint on the basis of res judicata. Having carefully reviewed the record, we find the analysis offered by the magistrate judge, and adopted by the district court, cogently premised and legally sound. Affirmed.

So ordered.

By the Court:
Richard Cushing Donovan, Clerk
By: Janice M. O'Neil
Chief Deputy Clerk

Appendix B: Judgment & Order of U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH,	)	
	)	
v.	)	Civil No. 01-208-P-C
	)	
TOWN OF SANFORD AND ITS INHABITANTS; SELECTMEN OF SANFORD; WILLIAM ROBERTS AND RICHARD WILKINS	)	

JUDGMENT

The defendant's Motion to Dismiss having been granted by the Court on November 26, 2001, judgment is hereby entered for the defendants, Town of Sanford and its Inhabitants; Selectmen of Sanford; William Roberts and Richard Wilkins, against the plaintiff, John Barth, and the complaint is hereby DISMISSED.

WILLIAM S. BROWNELL
CLERK
By: s/Michelle Levasseur,
Michelle Levasseur,
Deputy Clerk

Dated at Portland, Maine, this 26th day of November, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff	
v.	Civil No. 01-208-P-C
TOWN OF SANFORD, et al, defendants	

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the Court November 5, 2001, with copies to the pro se Plaintiff and to counsel, his Recommended Decision herein (Docket No. 12). Plaintiff filed his objection thereto on November 13, 2001 (Docket No. 13), and defendants waived their right to respond to Plaintiff's objection on November 21, 2001 (Docket No. 17). This Court having reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record and having made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision, and concurring with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision, and having determined that no further proceeding is necessary; it is ORDERED as follows:

(1) The objection of the Plaintiff is hereby DENIED;
(2) The Recommended Decision of The Magistrate Judge is hereby AFFIRMED;
(3) Plaintiff's motion for certification of a class is hereby DENIED;

(4) Defendant's motion to dismiss this action is hereby GRANTED.

s/ Gene Carter
GENE CARTER
District Judge

Dated at Portland, MAINE this 26th day of November, 2001

Appendix C: Magistrate Decision, U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff	
v.	Civil No. 01-208-P-C
TOWN OF SANFORD, et al, defendants	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND DEFENDANTS' MOTION TO DISMISS

The defendants, the town of Sanford, its inhabitants, its selectmen and two individuals, William Roberts and Richard Wilkins, move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6). Also pending is the pro se plaintiff's motion to certify a plaintiff class. I recommend that the court deny the motion to certify and grant the motion to dismiss.(1)

I. Class Certification

> The plaintiff seeks certification of the following class: the residents and landowners of the village of Springvale in the town of Sanford who reside within seven hundred feet of the former railbed there... and are injured in the use and enjoyment of their property by acts of defendant [sic] in maintaining, promoting, extending and refusing to abate a noise nuisance there.

(1) The plaintiff contends that the motion to dismiss is untimely. Plaintiff Class Opposition to Defendant Motion to Dismiss ("Opposition") (Docket No. 5) at 20. While ordinarily the 20 days allowed for a responsive pleading after

service of the complaint on the town clerk, see Return of Service, Exh. A to Opposition, would have expired on September 11, 2001, the filing of the motion to dismiss on September 12, 2001 (Docket No. 4) was not untimely because the clerk of this court extended deadlines for all litigants that fell on September 11, 2001 for one day due to the tragic national events of that day.

Complaint (Docket No. 1) paragraph P1. Class actions are governed by Fed. R. Civ. P. 23. It is not necessary to address the requirements of that rule under the circumstances present here, however. The plaintiff appears pro se and seeks to represent the proposed class. Plaintiff Motion for Order of determination of Class Action under Rule 23(c.)(1) (Docket No. 7) at 1. In general, class representatives cannot appear pro se. 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 1769.1 at 380 (2d ed. 1986).

> A litigant may bring his own claims to federal court without counsel, but not the claims of others. This is so because the competence of a layman is "clearly too limited to allow him to risk the rights of others."

Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000) (citations omitted), quoting *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975). See also *Avery v. Powell*, 695 F.Supp. 632, 643 (D. NH 1988). Given the nature of the claims set forth in the complaint and the sweeping scope of the relief sought, the plaintiff cannot serve as an adequate representative of the proposed class. Accordingly, his request for class certification should be denied.

II. Motion to Dismiss

A. Applicable Legal Standard

The defendants' motion invokes Fed. R. Civ. P. 12(b)(6). Defendants' Motion to Dismiss, etc ("Motion to

Dismiss") (Docket No. 4) at 1. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty the the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v Russo*, 96 F.3d 566, 569 (1st Cir. 1996); see also *Tobin v. University of Maine Sys.*, 59 F.Supp..2d 87, 89 (D.Me. 1999).

B. Discussion

The defendants contend that this action is barred by the operation of the legal doctrine of res judicata. Referring the court to an action filed by the plaintiff in state court entitled *John S. Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265. Motion to Dismiss at 4-5. That action was dismissed with prejudice, Order [dated March 30, 2000], *Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265, and the dismissal was upheld on appeal, *Barth v. Town of Sanford*, Decision No. Mem 00-111, Docket No. Yor-00-188, Maine Supreme Judicial Court (Oct. 2, 2000).

> [T]he federal doctrine of res judicata, or claim preclusion, bars a subsequent action whenever three criteria are met: (1) there is a final judgment on the merits in an earlier action; (2) "sufficient identity" exists between the parties in an earlier action and later suits, and (3) "sufficient identity" exists between the causes of action in the two suits.

United States v. Cunan, 156 F.3d 110, 114 (1st Cir. 1998). "Maine, whose earlier judgment is invoked here as res judicata, employs [a functional "same transaction" test in determining whether the cause of action in the two cases is the same], which is therefore binding" in this court.

Diversified Foods, Inc. v. First National Bank of Boston, 985 F.2d 27, 30 (1st Cir. 1993).

> Under Maine law,
>
> [c]laim preclusion bars the relitigation of a claim if (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action. To determine whether the matters presented for decision in the instant action were or might have been litigated in the prior action, we examine whether the same cause of action was before the court in the prior case. We apply a transactional test to define a cause of action, pursuant to which the measure of the cause of action is the aggregate of connected operative facts that can be handled together conveniently for purposes of trial. A prior judgment bars a later suit arising out of the same aggregate of operative facts event[sic] though the second suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves evidence different from that evidence relevant to the first case.

Johnson v. Samson Constr. Corp., 704 A.2d 866, 868 (Me. 1997). (citations and internal punctuation omitted).

The plaintiff contends that this action is not barred by res judicata because he has named parties in addition to the town as the defendants in this action, unlike the state action; the dismissal of the state action did not constitute a judgment on the merits; and the current action includes claims not raised in the state action. Opposition at 6-13.

The defendants named by the plaintiff in this action and not named in the state court action are the inhabitants of the town of Sanford, the Sanford selectmen and William Roberts and Richard Wilkins in their individual capacities. Complaint at 1. Roberts is identified in the complaint as the

chairman of the town selectmen and Wilkins as "an official responsible for road maintenance within said town." Id. Paragraphs P5-P6. While Wilkins and the selectmen are not the same party as the town of Sanford(2), the only defendant in the prior action, the law considers them to be the town's privies for purposes of res judicata analysis. In the context of government entities, the Maine Law Court has discerned privity between town officials and a town. *Camps Newfound/Owatonna Corp. v. Town of Harrison*, 705 A.2d 1109, 1114 (Me. 1998). While Roberts and Wilkins are named in their individual capacities and might therefore at first glance appear to be unprotected by res judicata, id. (finding privity only where individual defendants sued in their official capacity), a review of the allegations in the complaint and the nature of the relief sought demonstrates that Roberts and Wilkins also come within the ambit of the doctrine. The complaint

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(2) The plaintiff argues that the town of Sanford and the inhabitants of the town of Sanford are separate parties. Plaintiff's Opposition at 9. Maine law is to the contrary. See, e.g. *Bureau of Taxation v. Town of Washburn*, 490 A.2d 1182, 1185 (Me. 1985).

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alleges no acts by the individual defendants that are separate and distinct from the acts alleged to have been undertaken by the other defendants, and certainly no acts by these individuals that were beyond the scope of their positions with or employment by the town. Indeed, the complaint alleges in each of its five counts that the actions at issue have been undertaken pursuant to municipal policy, Complaint at 5-9, providing no basis whatsoever for individual liability. The relief sought, as set forth in the complaint at page 61 and in the draft order submitted with the complaint, runs solely against the town; the complaint seeks no payment from the individual defendants in that capacity. Thus, the individuals

are in sufficient privity with the town to warrant a finding of identity of parties. Id.

Contrary to plaintiff's next argument, dismissal with prejudice of the state-court action does constitute a judgment on the merits. *Johnson*, 704 A.2d at 869.

With respect to the plaintiff's third an final argument, the complaint in the present action presents five counts, alleging federal constitutional violations, violation of 41[sic] USC 1985, violation of the Maine Civil Rights Act, violation of 17 M.R.S.A. 2701 et seq, and violation of 36 M.R.S.A. 652, Complaint at 5-9, all arising out of "the increasing use of extremely noisy hobby vehicles...upon an abandoned railbed," refusal of municipal authorities to abate the nuisance and "harassment, threatening, vandalism, and asault against: the plaintiff resulting from attempts to seek redress, id. At 2. The complaint in the state-court action, while not stated in counts, seeks relief almost identical to that sought in the present action. Compare Complaint, John S. Barth v. Town of Sanford, Maine Superior Court (York County), Docket No. CV-99-265, at 29-31 with [Proposed] Order granting relief in this case. The plaintiff characterizes only Counts II and III of the instant complaint as "present[ing] entirely new kinds of causes of action," and argues that res judicata may not apply to the other three counts because they present continuing torts, since "every instance of a nuisance is a new cause of action." Opposition at 8. Count II of the complaint alleges violation of the plaintiff's right to equal protection under the federal constitution and state law, and Count III alleges denial of his rights to equal protection and due process on the same legal basis. While it is true that the state-court complaint does not specifically allege violations of these rights, the res judicata inquiry does not stop there.

Under the transactional test applied by the Maine courts to determine whether the same cause of action was before the court in the prior action, "[a] prior judgment bars a later suit arising out [of] the same aggregate of operative

facts even though the second suit relies on a legal theory not advanced in the first case." *Johnson*, 704 A.2d at 868. That is precisely the situation presented here. The plaintiff's federal constitutional claims presented in counts II and III of the complaint arise out of the same aggregate of operative facts as did his claims in the state-court action. Comparison of the factual allegations in the two complaints makes this clear. The same is true of the plaintiff's claims under the Maine Human Rights Act. "A plaintiff may not split a cause of action and prosecute each of its parts in separate lawsuits." Id. "Res judicata prevents a litigant from splintering his or her claim and pursuing it in piecemeal fashion by asserting in a subsequent lawsuit other grounds for recovery for the same claim that the litigant had a reasonable opportunity to argue in the prior action" Id. At 868-69 (internal punctuation and citation omitted)(3).

The plaintiff contends that Counts I, IV and V allege a continuing nuisance and accordingly cannot be barred by res judicata "unless prior final judgment explicitly comprehended all future instances of such tort." Plaintiff's Opposition at 8. The complaint does allege that "[t]he nuisance

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(3) Each of the federal causes of action asserted in the complaint could have been brought in state court: claims under 42 USC 1985 (Complaint at 5-9), see, e.g., Holland v.Sebunya, 759 A.2d 205, 209, & n.6 (Me 2000; claims under 42 USC 1983 for taking of property without compensation and denial of equal protection (Complaint at 5-7, 9), see, e.g., Cottle Enters., Inc. v. Town of Farmington, 693 A.2d 330, 334-335 (Me. 1997); claims under 42 USC 1983 for denial of due process, see, e.g., Munjoy Sporting & Athletic Club v. Dow, 755 A.2d 531

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caused by operation of ATVs, motorcycles, and snowmobiles upon the subject railbed has continued with the same effects to the date of this complaint." Complaint paragraph 139. In

the context of the application of a statute of limitations, it is a general rule of Maine law that "[a]s long as the nuisance continues unabated, a plaintiff may bring successive actions for damages throughout its continuance." Murray v. Bath Iron Works Corp., 867 F.Supp. 33, 48 (D.Me. 1994). However, when the issue involves application of the doctrine of res judicata, a different focus is required. The plaintiff's argument would allow a plaintiff to bring successive claims of nuisance after repeated holdings by the courts that the activities at issue did not constitute a nuisance, merely because the activities continued unchanged after each such finding. A more obvious waste of judicial resources is difficult to imagine. Here, the state court's dismissal of the plaintiff's earlier complaint with prejudice operates, as a matter of law, as a judgment on the merits. The possibility that the dismissal resulted from a procedural violation rather than a determination that the claims actually lacked substantive merit, as the plaintiff suggests here, Opposition at 8-11, makes no difference., *Johnson*, 704 A.2d at 8699 n.1. Activity that has been found, per entry of judgment, not to constitute a nuisance as a matter of law cannot become a nuisance merely by virtue of the passage of time after such a determination has been made. See generally *Department of Human servs. V. Lowatchie*, 569 A.2d 197, 199-200 (me 1990) (dismissal with prejudice seven years previously of action seeking to establish paternity for want of prosecution bars second action seeking identical relief, applying res judicata; "res judicata forecloses the relotigation of the fact of paternity established in an earlier proceeding.").

Res judicata as that doctrine is interpreted and applied by the Maine Law Court bars this action.

III. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for certification of a class be DENIED and that the defendants' motion to dismiss this action be GRANTED.

(NOTICE omitted)

Dated this 5th day of November, 2001.

s/David M. Cohen
David M. Cohen
United States magistrate Judge

Appendix D: Order, U.S. District Court, CV-286-PC

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff and Representative of Class v. TOWN OF SANFORD, defendant	Civil No. 01-286-P-C

ORDER DISMISSING COMPLAINT

Before the court is defendant's Motion to Dismiss the Complaint (Docket No. 5). The motion and supporting memorandum (Docket No. 6) set forth several bases for dismissal of the Complaint. They make no mention of the fact that the Complaint fails to plead any facts showing that this court has any subject matter jurisdiction over whatever claims might be found to be stated in the Complaint.

The Court, however, has the responsibility to note sua sponte an absence of subject matter jurisdiction. After full review of the Complaint and the rest of the file contents, the Court FINDS that the Complaint herein fails to allege facts showing the existence of any subject matter jurisdiction of this Court over any of the putative claims contained therein.

Accordingly, it is hereby ORDERED that the Complaint herein be, and it is hereby DISMISSED without prejudice for lack of subject matter jurisdiction.

So ORDERED,
s/Gene Carter
GENE CARTER, District Judge

Dated at Portland, Maine this 15th day of December, 2000.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff	
v.	Civil No. 01-286-P-C
TOWN OF SANFORD defendant	Entered on Docket on 12/15/00

JUDGMENT

In accordance with Judge Gene Carter's Order Dismissing Complaint dated December 15, 2000, judgment of dismissal, without prejudice, is hereby entered in this matter.

WILLIAM S. BROWNELL
Clerk
By: s/Christa K. Berry
Christa K. Berry
Deputy Clerk

Dated December 15, 2000.

Appendix E: Decision & Order, Maine Law Court

MAINE SUPREME JUDICIAL COURT

JOHN S. BARTH

v.

TOWN OF SANFORD

Submitted on Briefs September 27, 2000

Decided October 2, 2000

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DADA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

MEMORANDUM OF DECISION

John S. Barth appeals from the Superior Court's (York County, Fritzsche, J.) dismissal of the complaint against the Town of Sanford alleging nuisance. Contrary to Berth's contentions, the Superior Court did not exceed the bounds of its discretion when it granted the town's motion to dismiss, *Orlandella v. O'Brien*, 637 A.2d 105, 106 (Me. 1994), nor did the Superior Court exceed the bounds of its discretion by denying Barth's motion for default judgment, *Solomon's Rock Trust v. Davis*, 675 A.2d 506, 509 (Me. 1996), or when it denied Barth's motion for recusal. *Johnson v. Amica Mutual Insurance Co.*, 1999 ME 106, paragraph 11, 733 A.2d 977, 980. Given that the Superior Court properly granted the town's motion to dismiss, all of Barth's remaining claims of error are moot.

The entry is:

Judgment affirmed.

Appendix F: Order, Maine Superior Court, CV-99-265

STATE OF MAINE YORK, ss.	SUPERIOR COURT Civil Action DOCKET No. CV-99-265
JOHN BARTH, Plaintiff	)
v.	) ORDER
TOWN OF SANFORD, defendant	)

After hearing and UPON CONSIDERATION of the same, the Court hereby GRANTS defendant Town of Sanford's Motion to Dismiss the above-entitled action with prejudice. No additional sanction beyond the dismissal with prejudice is ordered. Should an appeal be taken from this dismissal the filing fee for the appeal will be waived upon request of the plaintiff.

Dated: 3/30/00

s/Paul A. Fritzsche
Justice, Superior Court

[parts of the original are handwritten]

Appendix G: Order, Maine Superior Court, RE-99-067

STATE OF MAINE — SUPERIOR COURT
YORK, ss. — CIVIL ACTION
DOCKET No. RE-99-024
RE-99-067

SPRINGVALE NATURE TRAIL NEIGHBORHOOD ASSOCIATION, et al.,
Plaintiffs
v.
TOWN OF SANFORD,
Defendant

DECISION AND ORDER

In both cases the defendant Town of Sanford has filed a motion to dismiss or in the alternative to strike the amended complaints for failure to comply with the provision of Rule 8(a)(1), M.R.Civ.P., that requires that a complaint shall contain... "a short and plain statement of the claim showing that the pleader is entitled to relief." Likewise, Rule 8(e)(1) requires that "Each averment of a pleading shall be simple, concise, and direct."

In case RE-99-024 the plaintiffs filed a bound pamphlet of 71 pages for a complaint with an even more extensive booklet entitled "Exhibits attached to Complaint". The defendant filed a motion to strike the complaint and by order of July 8, 1999 this Court ordered that any amended complaint "...shall not exceed 30 pages in length, double spaced with a typeface of at least 12 point". The Court believed that those requirements were very generous to the plaintiff given Rule 8. An amended complaint was filed which was 29 pages single spaced along with a 30 page memorandum of law and a 7 page memorandum of supporting fact and observation.

In case RE-99-067 the plaintiff filed a document entitled amended complaint which was also 29 pages long single spaced with extensive exhibits, a 30 page memorandum

of law and a 7 page memorandum of supporting fact and observation. The two cases are essentially the same.

The issue is not whether it is possible for the defendant to read the amended complaints and respond. Obviously it is possible to do so. The issue is whether a defendant should be required to struggle with and plod through a complaint which is unnecessarily complex and lengthy in light of the clear directive in the Maine Rules of Civil Procedure. While these requirements of Rule 8 were initially designed in part to protect plaintiffs from objections that their complaints were not detailed enough or in the precise form require by the abolished common law pleading requirements, the provisions of Rule 8 were also designed to protect defendants by simplifying proceedings. As the 1970 text *Maine Civil Practice* by Field, McKusick and Wroth states at Page 195 "A verbose statement of the evidence relied upon is of course not short and plain."

The entries are:

> In RE-99-024 and Re-99-067 the defendant's motion to dismiss is granted. The amended complaints are dismissed without prejudice. All other pending motions are dismissed as moot.

Dated: October 26, 1999

s/Paul A. Fritzsche
Paul A. Fritzsche
Justice, Superior Court

Appendix H: Order, Maine Superior Court, RE-99-024

State of Maine

YORK, ss. SUPERIOR COURT
RE-99-024

Springvale Nature Trail
Neighborhood Association
and John S. Barth,
Plaintiffs

v.

Town of Sanford
defendant

ORDER

This cause came on for hearing, and was argued by counsel, upon the motions of the parties.

IT IS ORDERED that: (1) the defendant's motion to strike the complaint is granted. The plaintiffs will be given 30 days from the date of this order to amend the complaint. It shall not exceed 30 pages in length, double spaced with a typeface of at least 12 point.

(2) the defendant's motion to dismiss the plaintiff Springvale Nature Trail Neighborhood Association is granted

(3) the plaintiffs' motion for judgment is denied

It is also ordered that the new complaint shall be kept under seal by the Clerk until October 1, 1999 subject to any further order from any justice.

Dated: July 8, 1999

s/Paul A. Fritzsche
Justice Superior Court

Appendix I: Text of 28 U.S.C. § 2072

28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

[continuation omitted]

Appendix J: Text of 42 USC §1983

Civil Rights Act 42 USC § 1983:

> " § 1983. Civil Action for deprivation of rights
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." R.S. § 1979.

Appendix K: Text of 17-A MRSA § 451.1.B

Title 17-A Chapter 19 § 451.1.B of the laws of Maine

1. A person is guilty of perjury if he makes:

A. In any official proceeding, a false material statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true; or

B. Inconsistent material statements, in the same official proceeding, under oath or affirmation, both within the period of limitations, one of which statements is false and not believed by him to be true.

2. In a prosecution under subsection 1, paragraph B, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the person to be true.

[continuation omitted]

Appendix L: Deed, establishing judicial financial interest

BK 4806 PG 093 33592

Keith R. Edmonds and Paula K. Edmonds, being husband and wife, both of Sanford, County of York and State of Maine, for consideration paid, grant to Paul A. Fritzsche and Anne D. Rodier, both of Kennebunk, County of York and State of Maine, with warranty covenants, as joint tenants, the land in Sanford, York County

A certain lot or parcel of land together with the buildings thereon situated in Sanford, County of York and State of Maine, on the northwesterly side of the road leading from the road from Sanford to North Berwick by way of Oak Hill to the highway leading from Sanford to North Berwick by way of Bauneg Beg Grange, so called, bounded and described as follows: Beginning on the Sand Pond Road, at an iron hub set in the ground near the southwesterly side of a wood road, so called, leading from said road to Sand Pond, said wood road being the first wood road southwesterly of said highway from Sanford to North Berwick by way of Oak Hill, thence running North 43° East by land of Miriam N. Siddall and along a fence consisting of pipes connected with wires to the shore of said pond; thence turning and running northwesterly along the shore of said pond 100 feet to a cement marker to be located in the ground and at land now or formerly of William Ellingwood; thence turning and running generally southwesterly along land of said Ellingwood 400 feet, more or less, to the northwesterly side of said road and another cement marker to be located in the ground; thence turning and running southeasterly along the northwesterly side of said road 100 feet to the point begun at.

Being the same premises conveyed to the grantors herein by Warranty Deed of Scott W. Hovey, dated December 11, 1979, and recorded in the York County Registry of Deeds, Book 2610, Page 193.

Witness our hands and seals this twenty-second day of July 1988

s/[illegible] s/Keith R. Edmonds, Keith R. Edmonds

s/[illegible] s/Paula K. Edmonds, Paula K. Edmonds

The State of Maine YORK ss. July 22, 1988

Then personally appeared the above named Keith R. Edmonds and Paula K. Edmonds and acknowledged the foregoing instrument to be their free act and deed,

Before me, s/Irving Patterson, Irving Patterson

IRVING PATTERSON IRVING PATTERSON

NOTARY PUBLIC,MAINE NOTARY PUBLIC

MY COMMISSION EXPIRES JUNE 21, 1991 MAINE

RECEIVED YORK, SS., 1988 AUG 15 AM 11:57

RECORDED REGISTRY OF DEEDS

ATTEST: s/Ann M Purgette [illegible], REGISTER

MAINE REAL ESTATE TRANSFER TAX PAID

13205 Warranty Deed - Joint Tenancy - Short Form

Appendix M: Table, results of poll of plaintiff class

[Exhibit E-11 6/97]
[detailed tabulation appears in confidential exhibit E-10]

Springvale Nature Trail Neighborhood Association
P.O. Box 88, Springvale, ME 04083

Dear Selectman,

The Neighborhood Association of the Springvale nature trail, the former B&M railroad bed, has conducted a poll of public opinion concerning the uses and problems of the trail. This letter describes the preliminary results of the poll.

The poll was distributed to all of the 266 homes within approximately 700 feet of the trail. The mail-in response rate is almost ten percent, a very high response rate for a mail-in opinion survey. Two responses were disqualified because no name or address were supplied. Both of these returns were in accordance with the majority opinion.

Majority Opinion:

Percentage	Response
90%	Most motor vehicles should be excluded from the trail
90%	All-terrain vehicles (ATVs) are among the most troublesome vehicles
70%	Motorcycles are among the most troublesome vehicles
80%	Noise is among the most serious problems
85%	Litter is among the most serious problems
80%	Damage is among the most serious problems
95%	Casual walking, hiking, and picnics should be permitted
80%	Bicycling should be permitted

75% Skiing should be permitted

Minority Opinion:

Percentage	Response
45%	Snowmobiles are among the most troublesome vehicles
40%	Property value loss is among the most serious problems
20%	Harassment is among the most serious problems
20%	Horseback riding should be permitted

Conclusions

The homeowners and residents of Springvale who are most affected by uses of the former B&M railroad bed, the Springvale Nature Trail, are firmly and overwhelmingly opposed to its use by most motor vehicles, or by horses. Because snowmobiles cannot be admitted without admitting motorcycles and ATVs, public opinion requires that the trail be blocked to public access by motor vehicles.

Documentation

All results of the poll, including all returns with names, addresses and signatures, are available for inspection by officials of the Town of Sanford. Contact John Barth at the address above.

Appendix N: Petition, class authorizing civil action.

[2/98]

Springvale Nature Trail Neighborhood Association

We the residents of the neighborhood of the Springvale Nature Trail, the former Boston & Maine railbed through Springvale, hereby associate and petition:

1. That the owners of said railbed shall effectively prevent its use by motorized vehicles or for any other nuisance or hazard, by constructing and maintaining durable and effective barriers to motorized vehicles at intervals not more than 200 yards along the railbed, to the satisfaction of this association;
2. That said owners grant a permanent easement upon such railbed, or convey title thereto to a neighborhood association which shall be constituted for this purpose: to construct and maintain barriers to motorized vehicles as described above, and to maintain the railbed for quiet recreational purposes only;
3. That civil action be taken as needed by this association to secure the peaceful enjoyment of residential property within 700 feet of this railbed, from hazards, noise, or other nuisance activity arising from incompatible uses of this railbed.

Name	Address	Signature

[20 names and addresses appear in Confidential Exhibit E-13]